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JOMOJAYA SDN BHD

v.

SAW GEOK NGOR

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HIGH COURT MALAYA, KUALA LUMPUR
NOOR AZIAN SHAARI JC
[CIVIL SUIT NO: S7-22-1385-04]
4 APRIL 2006

C ***CONTRACT:*** *Sale and purchase of land - Sale and purchase agreement - Whether binding - Whether constitutes a valid contract - Charles Grenier Sdn Bhd v. Lau Wing Hong - Rules of the High Court 1980, O. 81 r. 1(1)*

D ***CONTRACT:*** *Specific performance - Sale and purchase of land - Sale and purchase agreement - Application for - Whether appropriate - Mars Equity Sdn Bhd v. Tis 'ATA' Ashar Sdn Bhd - Rules of the High Court 1980, O. 81 r. 1(1)*

E F G H I This was an application *vide* a summons-in-chambers by the plaintiff against the defendant under O. 81 r.1(1)(a) of the Rules of the High Court 1980 ('RHC') for, *inter alia*, a declaration that the agreement signed on 13 October 2003 between the plaintiff and the defendant for the sale of a piece of land ('the land') was valid and binding on both parties and for specific performance of the said agreement. The defendant was the registered owner of the land. The plaintiff and the defendant signed an agreement and subsequently, on 15 October 2003, the plaintiff paid the defendant a deposit of RM20,000. However, *vide* a letter dated 5 January 2004, the defendant informed that she did not want to sell the land and subsequently returned the deposit and made an additional payment of RM20,000 as compensation. The plaintiff still wanted to purchase the land and returned to the defendant the amount of RM40,000. In her statement of defence, the defendant admitted signing the agreement but asserted that it was only a record of intention to enter into a contract and the agreement did not create a valid contractual agreement between the plaintiff and the defendant. The issue to be determined was whether the agreement signed between the plaintiff and the defendant constituted a valid contract between them.

Held (allowing plaintiff's claim):

(1) Since there was no dispute as to the existence of the agreement and that based on the facts that the case could be expeditiously disposed off, this was an appropriate case to be determined under O. 81 r. 1(1)(a) of the Rules of the High Court 1980.

(2) Based on the case of *Charles Grenier Sdn Bhd v. Lau Wing Hong*, the agreement of 13 October 2003 constituted an open contract and the parties are bound by certain obligations implied by the law. In the said agreement, the words in cl. 4 was 'shall' which in law connoted 'mandatory' and/or 'obligatory' and appeared to be stronger than 'subject to contract'. Therefore, the agreement binds the plaintiff and the defendant and they must execute the sales and purchase agreement.

(3) The fact that the defendant refunded the RM20,000 accompanied by another RM20,000 as compensation was itself an indication of admission that she was bound by the contract. The defendant had admitted by her action to being bound by the agreement but chose not to sell and therefore wanted to compensate the plaintiff. The reasons advanced by the defendant above was surely an afterthought.

(4) This court was of the opinion that it was more appropriate to order specific performance *(Mars Equity Sdn Bhd v. Tis 'ATA' Ashar Sdn Bhd.)*

Case(s) referred to:

Arthur Chan Sui Chung v. Fong Kin Voon & Anor [1998] 2 CLJ Supp 317 HC ***(refd)***

Charles Grenier Sdn Bhd v. Lau Wing Hong [1997] 1 CLJ 625 FC ***(refd)***

Ho Lai Ying & Anor v. Cempaka Finance [2004] 1 CLJ 232 CA ***(refd)***

Mars Equity Sdn Bhd v. Tis 'ATA' Ashar Sdn Bhd [2005] 1 CLJ 513 CA ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 14, O. 18 r. 1(1)(a), O. 81 r. 1(1)(a)

For the plaintiff - KK Lai; M/s KK Lai & Co
For the defendant - Hazalina Haron; M/s KK Chong & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Noor Azian Shaari JC:

[1] This is an application *vide* a summons-in-chambers by the Jomojaya Sdn. Bhd. ("the plaintiff") against Saw Geok Ngor ("the defendant") under O. 81 r. 1(1)(a) of the Rules of the High Court 1980 ("RHC") for:

(a) a declaration that the agreement signed on 13 October 2003 between the plaintiff and defendant for the sale of a piece of land known as PM 403, Lot 13542, Tempat Sg. Kayu Ara, Mukim Sg. Buloh, Daerah Petaling, Negeri Selangor is valid and binds both the plaintiff and the defendant;

(b) specific performance of the said agreement;

(c) an order that the defendant sign a sales and purchase agreement, a memorandum of transfer and an application to the State Authority and other necessary and relevant documents and hand over the required documents including the Suratan Hakmilik to the plaintiff's solicitors within seven days of the date of the order, failing which the senior assistant registrar or deputy registrar be given authority to do the same;

(d) damages to be assessed for breach of contract *in lieu* of or in addition to the specific performance;

(e) interest on the damages assessed; and

(f) cost of the application.

[2] The background to the case is as follows. By the writ and statement of claim filed by the plaintiff on 15 September 2004, the plaintiff is seeking exactly the same prayers as in the summon-in-chambers and as enumerated above.

[3] The facts that are not disputed are as follows:

(1) The defendant is the registered owner of the said land with an area of 32216 sq. feet;

(2) The plaintiff and defendant signed an agreement on 13 October 2003 and for ease of reference is reproduced below:

Re: Sale & Purchase of Property known as Lot 13542, P.M. 403, Mkm Sungai Buloh, Daerah Petaling measuring 32216 square feet.

1. Whereas SAW GEOK NGOR (620918-10-6114) (as 'Vendor') of No. 47, 3rd Floor, Jalan 1/116B, Kuchai Entrepreneur's Park, Off Jln Kuchai Lama, 58200 Kuala Lumpur is the legal and full beneficial owner of the property captioned.

2. Whereas JOMOJAYA SDN BHD (194018-M) (as 'Purchaser') hereby agrees to purchase from the Vendor the Property for the sum of RM1,385,288.00 only (based on RM43.00 per square feet for the said Property measuring 32,216 square feet).

3. Whereas the Purchaser hereby makes a payment of RM20,000.00 only vide Maybank Bhd cheque, 744064 which sum shall be treated as earnest deposit and part payment towards the Purchase Price and the said cheque is now accepted by the Vendor.

4. The Sale & Purchase Agreement shall be executed between the parties within 14 days hereof unless further extended.

5. If the Vendor shall fail to sell the Property or shall refuse or fail to execute the Sale & Purchase Agreement, the Purchaser shall have the option to demand the return of the Earnest Deposit and the payment of an additional RM20,000.00 as agreed liquidated damages OR to ask for specific performance for the sale of the Property.

6. If the Purchaser shall fail to purchase the Property or shall refuse or fail to execute the Sale & Purchase Agreement, the Vendor shall have the option to forfeit the Earnest Deposit OR to ask for specific performance for the purchase of the Property.

The terms and conditions aforesaid are agreed.

On behalf of Jomojaya Sdn. Bhd.

... ...
Director: Chin Ka Wong Saw Geok Ngor

Witness:

Dated October 13, 2003.

(3) Subsequent to that, on 15 October 2003 the plaintiff paid the defendant a deposit of RM20,000 by Cheque MBB No. 744064;

(4) A sales and purchase agreement should be signed by both plaintiff and defendant within 14 days from 13 October 2003;

(5) If the defendant fails to sell the said land, the plaintiff has an option to claim for a refund of the deposit of RM20,000 and additional sum of RM20,000 as compensation or apply for the remedy of specific performance;

(6) If the plaintiff fails to purchase the land, the defendant has a choice of forfeiting the deposit or seek for the remedy of specific performance;

(7) On 15 October 2003 solicitors for the plaintiff, Messrs. K.S. Tan & Co sent a draft of the sales and purchase agreement to the defendant;

(8) The defendant remained silent although Messrs. K.S. Tan & Co sent a few reminders to the defendant;

(9) *Vide* a letter dated 22 December 2003 Messrs. K.S. Tan informed the defendant that the plaintiff had deposited RM118,528.50 and asked the defendant to execute the sales and purchase agreement;

(10) *Vide* a letter dated 5 January 2004 the defendant informed Messrs. K.S. Tan that the defendant did not want to sell the land and subsequently returned the deposit of RM20,000 and made an additional payment of RM20,000 as compensation;

(11) *Vide* a letter of 9 February 2004 Messrs. K.S. Tan informed the defendant that the plaintiff still wanted to purchase the said land and returned to the defendant the amount of RM40,000;

[4] In her statement of defence filed on 19 October 2004, the defendant admitted signing the agreement of 13 October 2003 but asserted that it was only a record of intention to enter into a contract and the agreement does not create a valid contractual agreement between the plaintiff and the defendant. She further

stated that many terms and conditions of the proposed transaction were not discussed or agreed upon and asked that the claim be dismissed with cost.

[5] The defendant also counter-claimed for general damages and asked for a declaration and order that the plaintiff remove the caveat lodged in respect of the said land.

[6] However, on 25 November 2004 the plaintiff filed the summons-in-chambers under O. 81 r. 1(1)(a) RHC.

[7] So the question to be determined now is whether the agreement signed between the plaintiff and the defendant on 13 October 2003 constitute a valid contract between them.

[8] The defendant raised a preliminary issue and submitted that the suit should not be disposed off summarily under O. 81 r. 1(1)(a) of the RHC and cited the case of *Arthur Chan Sui Chung v. Fong Kin Voon & Anor* [1998] 2 CLJ Supp 317 where Richard Malanjum J (as he then was) said:

> Learned counsel for the Plaintiff submitted that an agreement existed on the purchase of his client's shares by the 1st Defendant. This is denied by the 1st Defendant. On the basis of the denial and having considered the evidence exhibited I think it is not appropriate at this stage to make a conclusive finding on the issue. Proper examination in the witness box of the relevant parties involved should be held as that will help this court to decide which version to accept.

[9] In the case cited by counsel for the defendant, there was a dispute as to whether there exists an agreement or not between the parties. In the case before me, there is no dispute as to the existence of the agreement of 13 October 2003. The issue is whether that agreement constitute a valid contract between the plaintiff and the defendant or otherwise. As such the authority cited is not relevant and can be differentiated from the case before me, I find that there is no need to hear evidence from the witness box. My task is only to determine if the agreement of 13 October 2003 constitute a contract and bind both the plaintiff and the defendant.

[10] The defendant further cited the case of *Ho Lai Ying (trading as KH Trading) & Anor v. Cempaka Finance* [2004] 1 CLJ 232 where Mohd Ghazali JCA (delivery the judgment of the court) said at p. 236:

A "Summary judgment procedure is a procedural device available for prompt and expeditious disposition of an action by a Plaintiff without trial when there is no dispute as to fact or law." In *Ng Hee Hong & Anor v. Public Bank Berhad* [1995]1 MLJ 281, the learned judge observed (at p. 287):

B The effect of O. 14 is to shut the defendant from having his day in the witness box. It is a very special jurisdiction and is only to be invoked in cases where there is no *bona fide* triable issues.

In *Doshi v. Yeoh Tiong Lay* [1975] 1 MLJ 8J, the learned judge said (at pp 86-87):

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> ... the purpose of O. 14 of the Rules of the Supreme Court 1957 is to enable the plaintiff to obtain summary judgment without trial if he can prove his case clearly and if the defendant is unable to set up *bona fide* defence or raise an issue against the claim which ought to be tried, final judgment should be allowed.
>
> Thus a plaintiff would be entitled to obtain summary judgment without trial if he can prove his case clearly which to us would mean the plaintiff has not established the existence of certain facts and must prove those facts exist before the court can determine the issue as to whether the defendant has a defence or has raised an issue against the claim which ought to be tried.

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F **[11]** Counsel for the defendant cautioned that the case cited is pertaining to O. 14 of the RHC whilst the application in issue is one under O. 18 r. 1(1)(a) of the RHC but went on to submit that the principles of law for summary judgment under O. 14 are similar for applications under O. 81 of the RHC as the purpose or the end result is the same.

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[12] I definitely agree with the learned counsel for the defendant. In fact the cases cited by the counsel for the defendant supports the plaintiff's application for O. 81 r. 1(1)(a) of the RHC for "prompt and expeditions disposition of an action by the plaintiff H without trial when there is no dispute as to fact or law."

[13] In this case before me, definitely there is no dispute as to the existence of the agreement of 13 October 2003. Hence no one had to be put into the witness box to prove anything. What I have to decide is whether the agreement is valid and binds the I plaintiff and the defendant.

[14] Since there is no dispute as to the existence of the agreement and that, based on the facts that the case can be expeditiously disposed off, I hold that this is a very appropriate case to be determined under O. 81 r. 1(1)(a) of the RHC. I therefore went on to hear the merits of the application.

[15] The plaintiff submitted that a valid contract exists between the plaintiff and the defendant by reason of the agreement signed on 13 October 2003 and they are bound by it and further submitted that the reasons raised by the defendant as enumerated below is an afterthought after many reminders were sent by the plaintiff:

(1) The agreement of 13 October 2003 was only to record the plaintiff's intention to enter into a sales and purchase agreement and will only be binding after a final agreement is signed;

(2) many terms and conditions had not been discussed and agreed to by the plaintiff and the defendant;

(3) According to the Bar Council Ruling 1997, sales and purchase agreement should be prepared by the defendant and not Messrs. K.S. Tan & Co., solicitors of the plaintiff;

(4) the said land was leased to New World Driving School from 1 July 2003 until 30 June 2004; and

(5) the said land was charged to Hong Leong Bank Bhd.

[16] The case of *Charles Grenier Sdn. Bhd. v. Lau Wing Hong* [1997]1 CLJ 625 is on point. The head notes read "Sale and purchase of property – "Subject to contract" agreement – Agreement to make agreement – Whether results in enforceable contracts – Whether for court to review on case by case basis.".

[17] Further in that case, Gopal Sri Ram JCA said at p. 634:

> Dr. Geoffrey Cheshire in 10th Edition of his work, *"The Modern Law of Real Property"* describes an open contract as follows:
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> > If a contract for sale specifies merely the names of the parties, a description of the property and a statement of the price, it is called an **open contract**. When this form of contract is made, the parties are bound by certain obligations implied by the law. (emphasis added).

[18] In the case, the phrase used was "subject to the sale and purchase agreement" which the court said:

> ... point to an intention that no contract was to come into existence until a formal sale and purchase agreement had been prepared and executed. Rather, they are, when read in the context of the correspondence and the objective aim of the transaction – and this is how we read them – indicative of an intention to merely formalize the agreement already concluded between the parties.

[19] In the case before me the important words in cl. 4 of the agreement are "The sale and purchase agreement shall be executed between the parties within 14 days hereof unless further extended.".

[20] Based on the case of *Charles Grenier Sdn. Bhd. v. Lau Wing Hong (supra)*, the agreement of 13 October 2003 constitutes an open contract and in the words of *Dr. Geoffrey Choshire (supra)* "When this form of contract is made the parties are bound by certain obligations implied by the law." It must also be noted that in the agreement between the plaintiff and the defendant the words in cl. 4 is "shall" which in law connotes "mandatory" and/or "obligatory" and appears to be stronger than "subject to contract", the words used in the *Charles Grenier Sdn. Bhd. v. Lau Wing Hong (supra)* case. Therefore it is imperative that the agreement of 13 October 2003 binds the plaintiff and the defendant and they must execute the sales and purchase agreement.

[21] As I have said earlier the decision of Gopal Sri Ram JCA is exactly on point and there is no need to look further for any other authorities.

[22] Further, the fact that the defendant refunded the RM20,000 accompanied by another RM20,000 as compensation is itself an indication of admission that she is bound by the contract. The defendant had admitted by her action to being bound by the agreement but chose not to sell and therefore wanted to compensate the plaintiff. The reasons advanced by the defendant above is surely an afterthought.

[23] However, I would have to consider whether it is justifiable or not to order specific performance. It was held in *Mars Equity Sdn. Bhd. v. Tis 'ATA' Ashar Sdn. Bhd.* [2005] 1 CLJ 513 that "A breach of contract relating to land is presume (rebuttable) to be

irremediable by monetary compensation. Hence, the appropriate remedy for the plaintiff would be specific performance of the land agreement." As such I am of the opinion it is more appropriate to order specific performance.

[24] I therefore allowed the plaintiff's claim with cost for a declaration that the agreement of 13 October 2003 between the plaintiff and defendant is valid and bind both the parties and also allowed the other prayers in the summons-in-chambers.